

FEDERAL ELECTION COMMISSION
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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

RAD Referral
98L-1A

DATE ACTIVATED: October 27, 1998

SOURCE:

INTERNALLY GENERATED

RESPONDENTS:

Tenet Healthcare Corporation
Tenet Healthcare Corporation Political Action
Committee and Susan Limon, as treasurer

RELEVANT STATUTES:

2 U.S.C. § 431(8)
2 U.S.C. § 432(b)(2)(B)
2 U.S.C. § 434(b)
2 U.S.C. § 441a(a)(8)
2 U.S.C. § 441b(a)
2 U.S.C. § 441b(b)(2)(C)
2 U.S.C. § 441b(b)(4)(D)
11 C.F.R. § 100.5(g)(4)
11 C.F.R. § 102.6(b)
11 C.F.R. § 102.8
11 C.F.R. § 102.9(a)(1)
11 C.F.R. § 110.6
11 C.F.R. § 114.1(a)(2)(iii)
11 C.F.R. § 114.2
11 C.F.R. § 114.5(b)
11 C.F.R. § 114.8

INTERNAL REPORTS CHECKED:

Referral Materials
Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

STAFF ASSIGNED:

Thomas J. Andersen

I. GENERATION OF MATTER

The Office of General Counsel received referrals from the Reports Analysis Division ("RAD") on August 18, 1998. The basis of Referral 98L-1A is the making of \$35,350 in apparently excessive contributions by the Tenet Healthcare Corporation Political Action Committee ("TenetPAC") during the 1997 Year End reporting period in the form of "earmarked" contributions.

II. FACTUAL AND LEGAL ANALYSIS

A. Applicable Law

The Federal Election Campaign Act of 1971, as amended ("Act"), prohibits a corporation from making contributions or expenditures in connection with any Federal election. 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(b). Section 441b(a) further prohibits any political committee to knowingly accept such a contribution. *See also* 11 C.F.R. § 114.2(d). The term "contribution or expenditure" shall include "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any" Federal election. 2 U.S.C. § 441b(b)(2). *See also* 2 U.S.C. § 431(8)(A)(i); 11 C.F.R. §§ 114.1(a)(1) and 100.7(a)(1).

The Act states, however, that the term "contribution or expenditure" does not include "the establishment, administration, and solicitation of contributions to a separate segregated fund ("SSF") to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock." 2 U.S.C. § 441b(b)(2)(C). *See also* 2 U.S.C. § 431(8)(B)(vi) and (9)(B)(v); 11 C.F.R. § 114.1(a)(2)(iii).

A trade association is defined at 11 C.F.R. § 114.8(a) as “a membership organization of persons engaging in a similar or related line of commerce, organized to promote and improve business conditions in that line of commerce and not to engage in a regular business of a kind ordinarily carried on for profit, and no part of the net earnings of which inures to the benefit of any member.” *An incorporated trade association or its SSF is permitted to solicit contributions from the stockholders and executive or administrative personnel, and their families, of the association’s member corporations, provided that the member corporation involved has separately and specifically approved the solicitation and has not approved a solicitation by any other trade association for the same calendar year.* 2 U.S.C. § 441b(b)(4)(D); 11 C.F.R. § 114.8(c)(1)-(2). The member corporation must grant such approval in writing prior to any solicitation of its stockholders and executive or administrative personnel. 11 C.F.R. § 114.8(d)(1)-(3). The request for approval may be addressed to the designated representative of the member corporation with whom the trade association regularly corresponds. Once authorization is granted, the association or its SSF may solicit the person approved by the member corporation. 11 C.F.R. § 114.8(e).

A collecting agent may pay any or all of the costs incurred in soliciting and transmitting contributions to an SSF to which it is related. 11 C.F.R. § 102.6(c)(2)(i); AOs 1998-25 and 1998-19. A collecting agent is defined in 11 C.F.R. § 102.6(b) as

an organization or committee that collects and transmits contributions to one or more [SSFs] to which the collecting agent is related. A collecting agent may be either:

- (i) A committee, whether or not it is a political committee as defined in 11 C.F.R. § 100.5, affiliated with the [SSF] under 11 C.F.R. § 110.3; or
- (ii) The connected organization of the [SSF] as defined in 11 C.F.R. § 100.6; or

(iii) The parent, subsidiary, branch, division, department, or local unit of the connected organization of the [SSF]; or

(iv) A local, national or international union collecting contributions on behalf of the [SSF] of any federation with which the local, national or international union is affiliated. *See* 11 C.F.R. § 114.1(e).

11 C.F.R. § 102.6(b)(1)(i)-(iv).

Every person who receives a contribution for a political committee which is not an authorized political committee shall, if the amount of the contribution is in excess of \$50, forward to the treasurer the contribution, the name and address of the person making the contribution, and the date of receipt of the contribution, no later than 10 days after receiving it. 2 U.S.C. § 432(b)(2)(B); 11 C.F.R. § 102.8(b)(2). If the amount of the contribution is in excess of \$200, the person forwarding the contribution shall identify the contributor's occupation and employer. *Id.*; 11 C.F.R. § 100.12. All recipient political committees shall disclose, for the appropriate reporting period, any contribution in excess of \$200, including the amount, date of receipt, donor's name, address, occupation and employer. 2 U.S.C. § 434(b); 11 C.F.R. § 102.9(a)(1).

The Act provides that all contributions by a person made on behalf of or to a candidate, including contributions which are in any way *earmarked or otherwise directed to the candidate* through an intermediary or conduit, are contributions from the person to the candidate. 2 U.S.C. § 441a(a)(8); 11 C.F.R. § 110.6(a). "Earmarked" means a "designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee." 11 C.F.R. § 110.6(b)(1). A "conduit or intermediary" is any person, with certain exceptions, who forwards an earmarked

contribution to a candidate or a candidate's authorized committee. 11 C.F.R. § 110.6(b)(2).

Section 110.6(c) imposes certain reporting obligations on the conduit or intermediary and on the recipient committee with regard to earmarked contributions.

B. Factual Background

Tenet Healthcare Corporation ("Tenet Healthcare") is a nationwide provider of health care services.¹ TenetPAC is its SSF and a qualified multicandidate committee. Tenet Healthcare is a member of the Federation of American Health Systems ("Federation"), a non-profit, incorporated national trade organization that represents nearly 1,700 owned and managed hospitals and health care systems. FedPAC is the Federation's SSF and a qualified multicandidate committee.²

In Schedule B of its 1997 Year End Report, TenetPAC disclosed a \$5,000 contribution on October 23, 1997 and a \$35,350 contribution on December 22, 1997, to FedPAC. Attachment 1 at 1-2. The latter contribution was described as "FedPAC – Earmarked Contributions solicited through TenetPAC." *Id.* at 2. In Schedule A of its Report, TenetPAC disclosed contributions received from 29 executives of Tenet Healthcare. These contributions, ranging from \$500 to

¹ According to its website, Tenet Healthcare owns or operates 128 acute care hospitals and related businesses in 18 states through its subsidiaries. Tenet Healthcare is headquartered in Santa Barbara, CA, and employs approximately 130,000 people nationwide. <<http://www.tenethealth.com>> (accessed Jan. 5, 1999). A recent Dun & Bradstreet search revealed that Tenet Healthcare is the second largest investor-owned healthcare services company in the United States.

² In its website, the Federation states that the purpose of FedPAC

is to support the election to Congress of candidates who understand the contributions of privately owned community hospitals and health systems and support a market driven approach to the nation's health care delivery system. FedPAC supports candidates interested in legislation that ensures that the private sector continues its essential role in providing quality care to the American people.

<http://www.fahs.com/public/publications/a_rep/about/html> (accessed Jan. 5, 1999).

\$3,000 and totaling \$36,600, were each described as “earmarked for FedPAC.” *Id.* at 3-19.

FedPAC, in its 1997 December and Year End Reports, disclosed a \$5,000 contribution from TenetPAC as being received on November 13, 1997, and a \$35,350 contribution from TenetPAC on December 31, 1997.³ FedPAC did not provide any further description or itemization of the \$35,350 contribution.

On February 18, 1998, RAD sent a Request for Additional Information (“RFAI”) to FedPAC regarding its 1997 Year End Report, notifying the committee that it had received an excessive contribution. The RFAI advised FedPAC to clarify if the contribution was incorrectly disclosed, and to transfer out or refund the amount in excess of \$5,000. By letter dated February 24, 1998, FedPAC responded that it had “miscategorized” the \$35,350 contribution as having been received directly from TenetPAC, when in fact it consisted of “individual contributions sent to TenetPAC but which were earmarked for FedPAC.” Attachment 2 at 1. FedPAC contended that the “retribution rules contained in 11 C.F.R. § 110.1(k) permit these contributions to be treated as if they had been made directly to FedPAC.” *Id.* The response included a list of the original 27 donors and the amount of their “earmarked” contributions. *Id.* at 3-5.

On February 25, 1998, RAD sent an RFAI to TenetPAC regarding its 1997 Year End Report, stating that TenetPAC had made contributions to FedPAC in excess of \$5,000 per calendar year. The RFAI recommended that TenetPAC clarify if the contributions were

³ There is a \$1,250 discrepancy between the \$35,350 contribution to FedPAC reported by TenetPAC and the sum of the individual contributions received by TenetPAC (\$36,600). This discrepancy appears to have resulted from two contributions received by TenetPAC during the reporting period (\$500 from Anthony P. Whitehead on December 23, 1997, and \$750 from Michael W. Gallo on December 29, 1997), but forwarded to FedPAC in January 1998.

incorrectly disclosed, or notify the recipient and request a refund of the amount in excess of \$5,000. On March 5, 1998, TenetPAC responded that it had been “‘earmarking’ contributions to FedPAC for a number of years. Prior to TenetPAC beginning this ‘earmarking,’ we spoke with someone from the . . . Commission to ensure that it was being done properly and legally.” On March 16, 1998, Charles H. Bell, Jr., an attorney responding via facsimile on behalf of TenetPAC, stated that TenetPAC “had responded to a similar inquiry [in 1997] and had received no response indicating that the explanation given was inadequate, and had, justifiably, believed that response and explanation had been accepted.” Attached to the letter was the same list of 27 donors submitted by FedPAC on February 24, 1998. See Attachment 2 at 3-5.

On April 17, 1998, a Second Notice was sent to FedPAC advising it to specify the method used by TenetPAC to solicit the contributions and to include a copy of the original solicitation. On April 23, 1998, Tom Scully, President and CEO of the Federation, called RAD and stated that the Federation is a trade group made up of corporations, some of which have their own SSFs. The SSFs receive funds from individuals, but may verbally suggest that the

contributors can make contributions to FedPAC, either directly or through the SSF. On May 4, 1998, FedPAC submitted a written response mistakenly stating that a \$35,700 contribution disclosed on its 1997 December Monthly Report was received in the form of a single check from TenetPAC, consisting of amounts collected by TenetPAC from "senior employees at Tenet Healthcare who had chosen to earmark them" for FedPAC.⁵ FedPAC's amended 1997 December Monthly Report, received on May 4, 1998, showed \$35,350 in contributions from Tenet Healthcare executives.

On May 6, 1998, two analysts from RAD met with Mr. Scully to discuss the contributions at issue. Mr. Scully provided copies of some checks from Tenet Healthcare executives to TenetPAC, which represented contributions "earmarked" for FedPAC. Attachment 3. The checks contain notations such as "[m]ay be earmarked for FedPAC." Mr. Scully explained that Tenet Healthcare did not allow FedPAC to solicit its executives directly. Instead, Tenet Healthcare agreed to solicit its members on behalf of FedPAC in order to reach an annual contribution goal of \$35,000. Mr. Scully further explained that he informs the board of directors of a member corporation that FedPAC needs money and that it is time to meet the contribution goal arranged by FedPAC and the corporation. The RAD analysts reiterated the need to clarify TenetPAC's solicitation method, preferably including a copy of the solicitation.

On May 20, 1998, Mr. Bell submitted a response on behalf of TenetPAC which confirmed that the \$35,350 contribution was sent by TenetPAC to FedPAC in the form of a single check from TenetPAC. Attached to the response was a "boilerplate version of the

⁵ FedPAC's original 1997 December Monthly Report showed no such contribution; the contribution referred to would appear to be the \$35,350 receipt from TenetPAC disclosed in FedPAC's 1997 Year End Report, which covered activity occurring in December 1997.

TenetPAC solicitation that was sent to [Tenet Healthcare] employees” from Michael H. Focht, President of Tenet Healthcare. Attachment 4. On June 22, 1998, FedPAC submitted an amended 1997 Year End Report showing the receipt of \$35,350 from TenetPAC and listing, as memo entries, 27 individual contributions comprising that amount. The individuals involved were the same Tenet Healthcare executives identified as donors in FedPAC’s response to RAD’s February 24, 1998 RFAI. See Attachment 2 at 3-5.

C. Analysis

The Act’s prohibition on corporate contributions would appear to apply to the solicitation of Tenet Healthcare executives on behalf of FedPAC. As previously stated, a contribution under § 441b includes “any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or *any services, or anything of value . . . to any candidate, campaign committee, or political party or organization*, in connection with any election to any” Federal election. 2 U.S.C. § 441b(b)(2) (emphasis added). The Commission’s regulations further explain that corporations and their representatives are “prohibited from facilitating the making of contributions to candidates *or political committees, other than to the [SSFs] of the corporations . . .*” 11 C.F.R. § 114.2(f)(1) (emphasis added). The provision of services to assist the Federation in raising money for its SSF is something of value and would appear to be prohibited by the Act and regulations. *See also* AO 1983-18.

The available information indicates that the 1997 contributions here at issue were a direct result of solicitations by Tenet Healthcare on behalf of FedPAC, pursuant to a predetermined contribution goal agreed upon by Tenet Healthcare and the Federation. A total of 27 Tenet Healthcare executives appear to have responded to these solicitations by making checks out to TenetPAC in amounts ranging from \$500 to \$3,000. These checks, containing such notations as

“[m]ay be earmarked for FedPAC,” were apparently collected by Tenet Healthcare personnel and deposited into TenetPAC’s account between November 7 and December 22, 1997. When the amount reached the target level of \$35,000 on December 22, TenetPAC sent a check for the total amount of contributions (\$35,350) to FedPAC. The solicitation, collection, processing and transmittal of these funds would appear to constitute an in-kind contribution by Tenet Healthcare to FedPAC. TenetPAC’s and FedPAC’s disclosure reports do not indicate any payments or reimbursements in connection with these activities.

As stated above, an exception to the Act’s broad prohibition on corporate contributions and expenditures – the costs of establishing, administering and soliciting contributions to a corporation’s SSF – permits a corporation to use its general treasury funds to pay for such costs associated *with its own* SSF. 2 U.S.C. § 441b(b)(2)(C); 11 C.F.R. § 114.5(b). The Commission’s regulations have interpreted the SSF exception to allow a “collecting agent” to collect and transmit contributions to an SSF to which the collecting agent is related. 11 C.F.R. § 102.6(c)(2); AOs 1998-25 and 1998-19.

Tenet Healthcare and its SSF do not, however, appear to meet the narrowly drafted criteria for qualifying as collecting agents for the Federation. 11 C.F.R. § 102.6(b)(1)(i)-(iv). First, the available information indicates that TenetPAC and FedPAC are not “affiliated” as that term is defined in the regulations. 11 C.F.R. § 102.6(b)(1)(i). Neither committee lists the other as an affiliated committee in their Statements of Organization, and the relationship between their “sponsoring organizations” – the Federation and Tenet Healthcare – does not appear to extend beyond that of a trade association with one of its member corporations. 11 C.F.R. § 110.3. Second, Tenet Healthcare is clearly not the connected organization of the Federation’s SSF as defined in 11 C.F.R. § 100.6. 11 C.F.R. § 102.6(b)(1)(ii). FedPAC’s Statement of Organization

lists only the Federation as its connected organization; further, Tenet Healthcare does not appear to administer or financially support FedPAC, even though it may pay membership dues to the Federation. *See* 11 C.F.R. § 100.6(a). As stated in § 100.6(b), “organizations which are members of the entity (such as corporate members of a trade association) which establishes, administers, or financially supports a political committee are *not* organizations which directly or indirectly establish, administer, or financially support that political committee” (emphasis added). Third, Tenet Healthcare appears to be an independent business rather than a “parent, subsidiary, branch, division, department, or local unit” of the Federation. 11 C.F.R. § 102.6(b)(1)(iii). Its status as an organizational member of the Federation does not qualify it as a “unit” of the Federation for purposes of the regulation. *See* AOs 1985-37 and 1989-3, fn. 2. *Cf.* AO 1998-19. Finally, 11 C.F.R. § 102.6(b)(1)(iv) does not apply in this matter as Tenet Healthcare is an incorporated organization rather than a union affiliate.

Based on the foregoing, this Office recommends that the Commission find reason to believe that Tenet Healthcare Corporation violated 441b(a) by making in-kind corporate contributions to FedPAC in the form of solicitation and other costs.⁶

⁶ As noted in Part II.B, *supra*, Mr. Scully stated that Tenet Healthcare did not allow the Federation to solicit Tenet’s executives; accordingly, the trade association exemptions at 11 C.F.R. § 114.8 do not apply to the contributions at issue. It is not clear if Tenet had already authorized another trade association to solicit its executives in calendar year 1997 pursuant to § 114.8(c)(2), but a review of the Commission’s contribution indices would suggest that it had not since only one Tenet employee contributed to another trade association that year.

Although the contributions at issue were reported as being “earmarked” by Tenet Healthcare executives to FedPAC, the earmarking provisions of the Act and Commission regulations described above refer only to contributions made “either directly or indirectly on behalf of a particular candidate” 2 U.S.C. § 441a(a)(8); 11 C.F.R. § 110.6(b)(1).⁸ The Act and regulations do not specifically address contributions “earmarked” for political committees that are not authorized committees of candidates. However, the Commission has held that this omission does not bar such contributions, so long as they are properly forwarded to the designated political committee donee.⁹ AOs 1981-57 and 1983-18. Because all the contributions at issue were greater than \$50, TenetPAC was required to forward them to FedPAC within 10 days, along with the required recordkeeping information. 2 U.S.C. § 432(b)(2)(B); 11 C.F.R. § 102.8(b)(2). TenetPAC’s disclosure reports indicate that the following contributions were not timely forwarded to FedPAC:

⁸ Other sections of the regulations that discuss earmarked contributions also specifically refer to such contributions as being earmarked *for a candidate*. See, e.g., 11 C.F.R. §§ 110.5(c)(3)(ii), 114.2(f)(2)(iii), (3)(ii) and (4)(iii).

⁹ If designated contributions are deposited in the forwarding committee’s bank account, they must be reported as receipts and disbursements with an accompanying explanation, as it appears TenetPAC has done. See AOs 1981-57 fn. 3 and 1983-18 fn. 2.

Contributor	Amount	Date received by TenetPAC	Date forwarded to FedPAC	Days late
Jeffrey C. Barbakow	\$3,000	11/13/97	12/22/97	29
Jim Biltz	\$1,500	11/13/97	12/22/97	29
Steven Blake	\$500	11/18/97	12/22/97	24
Norman S. Bobes	\$1,500	11/13/97	12/22/97	29
Scott Brown	\$1,500	11/21/97	12/22/97	21
Stephen Brown	\$1,500	11/17/97	12/22/97	25
Thomas Casaday	\$750	12/01/97	12/22/97	11
David Dearman	\$500	11/19/97	12/22/97	23
Alan Ewalt	\$1,500	11/07/97	12/22/97	35
Michael Focht, Sr.	\$3,000	12/05/97	12/22/97	7
Douglas Fritsche	\$500	11/19/97	12/22/97	23
Reynold J. Jennings	\$1,500	11/17/97	12/22/97	25
Dennis Jorgensen	\$1,500	11/13/97	12/22/97	29
Ben King	\$750	11/17/97	12/22/97	25
Kenneth B. Love, Jr.	\$500	11/19/97	12/22/97	23
William M. Murray	\$1,600	11/17/97	12/22/97	25
Karen S. Poole	\$750	11/17/97	12/22/97	25
Scott Richardson	\$500	12/05/97	12/22/97	7
Neil Sorrentino	\$1,500	11/10/97	12/22/97	32
Don S. Steigman	\$1,500	11/07/97	12/22/97	35
Ed Tudanger	\$1,000	11/19/97	12/22/97	23
Michael Tyson	\$500	12/01/97	12/22/97	11
Kenneth K. Westbrook	\$750	12/01/97	12/22/97	11
Barry Wolfman	\$750	11/21/97	12/22/97	21
TOTAL:	\$28,850			

Accordingly, this Office recommends that the Commission find reason to believe that Tenet Healthcare Corporation Political Action Committee and Susan Limon, as treasurer, violated 2 U.S.C. § 432(b)(2)(B).

III. DISCUSSION OF CONCILIATION PROVISIONS AND CIVIL PENALTIES

IV. RECOMMENDATIONS

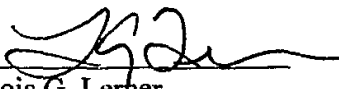
1. Open a MUR for RAD Referral 98L-1A.
- 2.
3. In RAD Referral 98L-1A, find reason to believe that Tenet Healthcare Corporation violated 2 U.S.C. § 441b(a), and enter into conciliation prior to a finding of probable cause to believe.

4. In RAD Referral 98L-1A, find reason to believe that Tenet Healthcare Corporation Political Action Committee and Susan Limon, as treasurer, violated 2 U.S.C. § 432(b)(2)(B), and enter into conciliation prior to a finding of probable cause to believe.
- 5.
6. Approve the attached Factual and Legal Analyses , proposed conciliation agreements and the appropriate letters.

Lawrence M. Noble
General Counsel

3/16/99
Date

BY:



Lois G. Lerner
Associate General Counsel



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE
GENERAL COUNSEL

FROM: MARJORIE W. EMMONS/LISA R. DAVIS
COMMISSION SECRETARY 

DATE: MARCH 19, 1999

SUBJECT: RAD Referral #98L-01A & 98L-01B - First General Counsel's
Report dated March 16, 1999.

The above-captioned document was circulated to the Commission
on Tuesday, March 16, 1999.

Objection(s) have been received from the Commissioner(s) as
indicated by the name(s) checked below:

Commissioner Elliott	<u>XXX</u>
Commissioner Mason	<u>XXX</u>
Commissioner McDonald	—
Commissioner Sandstrom	—
Commissioner Thomas	<u>XXX</u>
Commissioner Wold	—

This matter will be placed on the meeting agenda for
Tuesday, March 23, 1999.

Please notify us who will represent your Division before the Commission on this
matter.